

ORIGINAL

PAGES 1-38

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SPENCER WILLIAMS, SENIOR JUDGE

ROGER SCHLAFLY,

PLAINTIFF,

VS.

PUBLIC KEY PARTNERS, ET AL.,

DEFENDANTS

CASE NO. C-94-20512 SW

WEDNESDAY, AUGUST 27, 1997  
SAN JOSE, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

FOR THE PLAINTIFF

ROGER SCHLAFLY, IN PROPRIA PERSONA  
P.O. BOX 1680  
SOQUEL, CALIFORNIA 95073

FOR THE DEFENDANT  
RSA DATA SECURITY

HELLER, EHRLICH, WHITE & MCAULIFFE  
BY: ROBERT T. HASLAM AND  
ROBERT D. FRAM  
525 UNIVERSITY AVENUE  
PALO ALTO, CALIFORNIA 94301

REPORTED BY:

LEE-ANNE SHORTRIDGE  
OFFICIAL COURT REPORTER, USDC

APPEARANCES CONTINUED ON NEXT PAGE

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SEP 23 4 56 PM '97  
RICHARD W. KING  
CLERK  
U.S. DISTRICT COURT  
NO. DIST. OF CAL. S.D.

FILED

307

1 APPEARANCES (CON'T)

2 FOR THE DEFENDANT  
3 PKP

LAW OFFICES OF THOMAS R. HOGAN  
BY: THOMAS R. HOGAN  
60 SOUTH MARKET STREET, SUITE 1125  
SAN JOSE, CALIFORNIA 95113

4  
5 ALSO PRESENT

PAUL LIVESAY,  
DIRECTOR OF LEGAL AFFAIRS  
RSA DATA SECURITY

1 WEDNESDAY, AUGUST 27, 1997

2 THE CLERK: CALLING FIRST CASE, C-94-20512,  
3 ROGER SCHLAFLY VERSUS PUBLIC KEY PARTNERS, ET AL, ON FOR  
4 DEFENDANT R.S.A. DATA SECURITY INC.'S MOTION FOR SUMMARY  
5 JUDGMENT ON PLAINTIFF'S NON-INFRINGEMENT CLAIM AND DEFENDANT  
6 PUBLIC KEY PARTNERS' CLAIM FOR PARTIAL SUMMARY JUDGMENT.

7 COUNSEL, PLEASE STATE YOUR NAME FOR THE RECORD.

8 THE COURT: MR. SCHLAFLY?

9 MR. SCHLAFLY: GOOD MORNING, YOUR HONOR. THIS IS  
10 ROGER SCHLAFLY.

11 THE COURT: OKAY.

12 MR. HASLAM: GOOD MORNING, YOUR HONOR.  
13 ROBERT HASLAM FOR R.S.A. DATA SECURITY.

14 MR. FRAM: ROBERT FRAM FOR R.S.A. DATA SECURITY.

15 MR. HOGAN: GOOD MORNING, YOUR HONOR.  
16 THOMAS R. HOGAN ON BEHALF OF THE DEFENDANT PUBLIC KEY PARTNERS.

17 MR. HASLAM: YOUR HONOR, I'LL BE ARGUING THE MOTION  
18 ON INFRINGEMENT, AND MR. HOGAN AND MR. FRAM WILL BE ARGUING THE  
19 MOTION ON THE ANTI-TRUST BUSINESS TORTS CLAIMS. WE WEREN'T SURE  
20 WHETHER THE COURT HAD IN MIND AN ORDER IN WHICH IT WANTED TO  
21 TAKE THOSE OR NOT.

22 THE COURT: NO, I DON'T. THIS IS R.S.A.'S MOTION  
23 FOR SUMMARY JUDGMENT ON PLAINTIFFS NON-INFRINGEMENT CLAIM. WE  
24 MIGHT AS WELL TAKE THAT FIRST.

25 MR. HASLAM: OKAY. I THINK OUR BRIEFS COVER THE

1 SUBJECT FAIRLY WELL, SO I'LL JUST TRY TO MAKE SOME OVERVIEW  
2 OBSERVATIONS.

3 I DO WANT TO ADDRESS THE COURT'S RULING WHICH JUST  
4 CAME OUT, BECAUSE I THINK IT DOES BEAR ON THIS, ALTHOUGH THEY  
5 ARE TWO DIFFERENT TESTS, ONE IS WHETHER IT'S PATENTABLE SUBJECT  
6 MATTER, AND THIS ONE IS, QUOTE, "WHEN THERE'S SOME SUBJECT  
7 ALGORITHM."

8 BUT I THINK TO ACCEPT MR. SCHLAFLY'S ARGUMENT WOULD  
9 BE TO HAVE TO GO BACK AND REJECT WHAT THE COURT HAS ALREADY  
10 FOUND IN THAT RULING, BECAUSE THE ISSUES, WHILE DIFFERENT, ARE  
11 VERY INTERRELATED SINCE THE 101 MATTER WHICH WAS BEFORE THE  
12 OFFICE WHICH THE COURT ANALYZED TURNED VERY MUCH ON THIS, QUOTE,  
13 "HYPOTHETICAL ANALYSIS" OF WHETHER THERE WAS OR WAS NOT AN  
14 ALGORITHM IN THE PATENTS.

15 AND AS THE COURT FOUND, THE CLAIMED INVENTIONS OF  
16 VARIOUS, THE VARIOUS CLAIMS IN THE R.S.A. PATENT HAVE A  
17 PRACTICAL USE THAT THEY SEND MESSAGES SECURELY BY TRANSFORMING  
18 THE MESSAGES AND SENDING A SIGNAL AND THEN TRANSFORMING IT AND  
19 DECODING IT.

20 THAT'S CLAIMED IN A VARIETY OF SYSTEM CLAIMS. IN A  
21 VARIETY OF METHOD CLAIMS AND VARIOUS ASPECTS, THE CODING AND  
22 DECODING ARE CLAIMED. AND, AS THE COURT ALSO FOUND, MANY OF THE  
23 CLAIMS ARE SUBJECT TO 1126.

24 WHAT MR. SCHLAFLY IS ESSENTIALLY DOING IS TAKING A,  
25 TRYING TO TAKE A SECOND BITE BY COMING BACK AND ARGUING THAT

1     WHATEVER THE CLAIMS MAY MEAN, BECAUSE OF ONE SENTENCE IN A  
2     TEN-PAGE REMARK THAT SAYS THE CLAIMS DO NOT EMBODY AN ALGORITHM,  
3     THEREFORE, WHAT HE CALLS THE, QUOTE, "R.S.A. ALGORITHM" IS NOT  
4     COVERED BY ANY OF THE CLAIMS.

5             NOW, MR. SCHLAFLY DOES NOT REALLY DEFINE WHAT HE  
6     MEANS BY THE R.S.A. ALGORITHM, BUT TO ACCEPT WHAT I THINK HE  
7     MEANS IS TO SAY THAT THE COURT AND THE PATENT OFFICE FOUND THESE  
8     CLAIMS PATENTABLE, BUT THEIR SCOPE IS ZERO, THEY DON'T COVER  
9     ANYTHING, AND I THINK THAT'S ABSURD.

10            I THINK HIS READING OF THE ONE SENTENCE OUT OF  
11    CONTEXT IS SIMILAR TO THE CASE WE CITED, WHICH WAS SANCTIONABLE  
12    ON APPEAL BY AWARDING DOUBLE COSTS. HE IS CLEARLY TAKING THAT  
13    ONE SENTENCE OUT OF CONTEXT. HE IS NOT DOING WHAT HE'S REQUIRED  
14    TO DO, OR WHAT THE COURT IS REQUIRED TO DO, WHICH IS TO TAKE THE  
15    PROSECUTION HISTORY AS A WHOLE.

16            I THINK WHEN YOU LOOK AT THE PROSECUTION HISTORY AS  
17    A WHOLE, WHAT THE PATENT ATTORNEY MEANT WHEN HE SAID THEY DO NOT  
18    EMBODY AN ALGORITHM IS SET FORTH LATER IN HIS REMARKS.

19            NOW, THE ONE THING HE CLEARLY SAYS IS THE CLAIM  
20    COVERS THE TRANSFORMATION OF THE MESSAGE TO THE CIPHERTEXT TEXT  
21    AND CIPHERTEXT TO THE MESSAGE, AND THAT'S NOT ALGORITHM. HE  
22    DIDN'T SAY THERE'S NO, QUOTE, "R.S.A. ALGORITHM."

23            WHAT HE SAID IS THERE'S NO ALGORITHM EMBODIED IN  
24    THAT CLAIM BECAUSE THERE'S THIS TRANSFORMATION OR INFLUENCE, AND  
25    MR. SCHLAFLY SAYS THAT'S GOBBLEDYGOOK, BUT I THINK WHAT THE

1 PATENT ATTORNEY MEANT WAS WHEN YOU HAVE THE CLAIMED TEXT AND THE  
2 CIPHERTEXT, THOSE ARE CLEARLY NOT EQUAL IN THE MATHEMATICAL  
3 SENSE BECAUSE ONE IS A TRANSFORMATION OF THE OTHER. IT'S SIMPLY  
4 A BIT STREAM. THE MESSAGE MAY BE ONE, ONE, ONE, ONE AND THE  
5 CIPHERTEXT MAY BE ONE, ZERO, ONE, ONE, ZERO. THEY CLEARLY ARE  
6 NOT EQUAL IN THE MATHEMATICAL SENSE.

7 BUT THEY ARE, AS THE PATENT ATTORNEY SAID, CONGRUENT  
8 IN THAT ONE IS RELATED TO THE OTHER PURSUANT TO CERTAIN  
9 RELATIONSHIPS OR PARAMETERS WHICH ARE SET FORTH IN THE CLAIMS.

10 I ALSO THINK WHAT'S -- EVEN IF YOU DON'T ACCEPT ANY  
11 OF WHAT I'VE SAID BEFORE WAS DISPOSITIVE, I THINK THAT THE  
12 PATENT ATTORNEY, AT THE END OF HIS REMARKS, ARGUED AND SET FORTH  
13 AN ARGUMENT THAT SAYS "EVEN IF YOU THINK THERE'S AN ALGORITHM IN  
14 HERE, THESE CLAIMS DON'T PREEMPT THE ALGORITHM," AND THAT'S  
15 PRECISELY WHAT THE COURT FOUND ON PAGE TEN OF ITS ORDER WHERE  
16 YOU SAID, "THE CLAIMED INVENTION IS NOT MERELY A DISEMBODIED  
17 MATHEMATICAL CONCEPT, BUT RATHER A SPECIFIC MACHINE DESIGNED TO  
18 TRANSFORM AND TRANSMIT WORK SERIES."

19 THEN YOU WENT ON TO SAY, "IT'S NOT SO ABSTRACT THAT  
20 IT ENTIRELY PREEMPTS THE USE OF ANY APPARATUS USING THE  
21 MATHEMATICAL CALCULATIONS CITED THEREIN."

22 THAT'S WHAT WAS ARGUED BY THE PATENT ATTORNEY TO THE  
23 PATENT OFFICE.

24 EVEN IF WE DON'T ACCEPT THAT, WHAT IS DISPOSITIVE IS  
25 THAT THE EXAMINER DIDN'T RELY ON THE REMARKS THAT WERE MADE. HE

1 CONTINUED HIS REJECTION AND ONLY WITHDREW THE 101 REJECTION WHEN  
2 HE, WHEN THE R.S.A. ATTORNEY ADDED TO THE CLAIMS THE WORDS  
3 "MESSAGE SIGNAL," THE WORD "SIGNAL" TO CONFIRM, I BELIEVE, THAT  
4 WHAT THIS, THE CLAIMS IN THE PATENT IN VARIOUS WAYS THEY'RE  
5 CLAIMING IS A REAL WORLD PHYSICAL PROCESS, NOT SOME ABSTRACT  
6 DISEMBODIED MATHEMATICAL ALGORITHM OR NOT SOMETHING THAT  
7 PREEMPTS THE ENTIRE ALGORITHM.

8 SO I THINK THAT THE ARGUMENT THAT MR. SCHLAFLY  
9 PRESENTS BORDERS ON THE ABSURD, IT BORDERS ON THE SANCTIONABLE  
10 SIDE IF IT DOESN'T, IN FACT, GO OVER THAT LINE, AND IT IS BASED  
11 ON TAKING ONE SENTENCE IN A TEN-PAGE REMARK AND THEN ASSIGNING  
12 SOME ABSURD, NONSENSICAL, TOTALLY ILLOGICAL MEANING TO IT.

13 THE COURT: THANK YOU.

14 MR. SCHLAFLY?

15 MR. SCHLAFLY: THANK YOU.

16 YOUR HONOR, I DO NOT BELIEVE I TOOK THAT ONE  
17 SENTENCE OUT OF CONTEXT. IF YOU LOOK AT THE PLACE WHERE THAT  
18 SENTENCE OCCURS, IT'S UNDERLINED, IT'S EMPHASIZED.

19 THAT SENTENCE WAS THOUGHT ABOUT VERY CAREFULLY BY  
20 THAT PATENT LAWYER AND THAT PATENT LAWYER KNEW WHAT HE WAS DOING  
21 WHEN HE SAID THAT SENTENCE. IT WAS NOT AN ACCIDENT. THAT  
22 SENTENCE IS WHAT IT IS.

23 I THINK IT'S VERY ODD FOR MR. HASLAM TO COME HERE  
24 AND SAY THAT WITHOUT COVERAGE ON MATHEMATICAL ALGORITHMS  
25 THEMSELVES, THE SCOPE IS ZERO, BECAUSE THAT'S ESSENTIALLY SAYING

1 THAT THIS IS JUST A PATENT COVERING JUST A PLAIN OLD  
2 MATHEMATICAL ALGORITHM.

3 AND IF THAT'S WHAT IT IS, WELL, THAT'S, I DON'T  
4 KNOW. I GUESS THAT'S APPARENTLY WHAT THE EXAMINER THOUGHT IT  
5 WAS, BUT THE EXAMINER WAS PERSUADED BY THE APPLICANT  
6 SPECIFICALLY DISCLAIMING ANY COVERAGE OF A MATHEMATICAL  
7 ALGORITHM, AND IT'S -- IF YOU DISCLAIM, IF YOU SPECIFICALLY  
8 DISCLAIM COVERAGE OF SOMETHING IN YOUR PATENT APPLICATION, WELL  
9 THEN, THERE'S AN ESTOPPEL CREATED AND YOU DON'T GET COVERAGE OF  
10 THAT IN THE PATENT.

11 NOW, THE IDEA THAT THE EXAMINER DIDN'T RELY ON THAT,  
12 I DON'T SEE HOW HE CAN SAY THAT. I MEAN, THE EXAMINER'S  
13 COMMENTS ARE VERY MATERIAL. HE REQUIRED SOME EXTRA LANGUAGE IN  
14 THE CLAIM, BUT IT SURE SEEMS TO ME THAT HE WAS, THE EXAMINER WAS  
15 VERY CONCERNED ABOUT THE 101 STATUTORY SUBJECT MATTER AND HE WAS  
16 VERY LIKELY TO BE PERSUADED.

17 WHAT THE PATENT APPLICANT WAS TRYING TO --

18 THE REPORTER: YOUR HONOR, MAY I HAVE A MINUTE? I'M  
19 HAVING A PROBLEM WITH MY MACHINE.

20 (PAUSE IN PROCEEDINGS.)

21 MR. SCHLAFLY: I THINK THE APPLICANT FOR THE PATENT  
22 WAS TRYING TO FOOL THE EXAMINER ABOUT WHAT THE PATENT WAS ABOUT,  
23 AND HE GIVES THIS ARGUMENT THAT SAYS THAT, "WELL, THESE ARE NOT  
24 REALLY MATHEMATICAL FORMULAS BECAUSE THEY USE THESE  
25 CONGRUENCES," AND DESPITE WHAT MR. HASLAM SAYS, I JUST DON'T



1 THINK THAT ARGUMENT MAKES ANY SENSE. HE SAYS THAT BECAUSE IT'S  
2 A CONGRUENCE, THESE THINGS ARE NOT EQUAL IN A MATHEMATICAL  
3 SENSE.

4 WELL, I DON'T KNOW WHAT OTHER SENSE THEY'RE EQUAL IN  
5 IF IT'S NOT A MATHEMATICAL SENSE. I BELIEVE THEY'RE VERY  
6 DEFINITELY EQUAL IN A MATHEMATICAL SENSE, AND IN THE -- THEY ARE  
7 MATHEMATICAL FORMULAS, AND IF THE APPLICANT CHOOSES TO  
8 SPECIFICALLY DISCLAIM THE COVERAGE OF MATHEMATICAL FORMULAS  
9 BECAUSE THAT'S WHAT IT TAKES TO GET HIS PATENT THROUGH THE  
10 PATENT OFFICE, THAT'S FINE. HE'S ALLOWED TO DISCLAIM COVERAGE  
11 OF CLAIMS.

12 BUT IF IT TURNS OUT LATER THAT THAT ZEROS OUT HIS  
13 CLAIM COVERAGE, THEN THAT'S THE APPLICANT'S PROBLEM. HE CAN'T  
14 WITHDRAW SOME SPECIFIC DISCLAIMER THAT HE MADE IN HIS  
15 APPLICATION.

16 THE COURT: THANK YOU.

17 MR. HASLAM?

18 MR. HASLAM: JUST A FEW BRIEF COMMENTS. I WAS NOT  
19 SURPRISED THAT MR. SCHLAFLY GOT UP HERE AND TRIED TO REFUTE MY  
20 ARGUMENT BUT NEVER PUT FORTH WHAT HE SAID THE CLAIMS DO COVER IF  
21 HIS ARGUMENT IS TO BE ACCEPTED.

22 HE ALSO STILL HAS NOT TOLD US WHAT HE MEANS BY THE  
23 USE OF THE TERM, QUOTE, "R.S.A. ALGORITHM."

24 I THINK WHEN YOU READ AGAIN, AS YOU'RE SUPPOSED TO  
25 DO, THE WHOLE ENTIRETY OF THE PROSECUTION HISTORY, WHAT THE

1 PATENT ATTORNEY CLEARLY MEANT, WHAT HE SAID IS THERE'S NO  
2 ALGORITHM AND NOT THAT THE CONGRUENT RELATIONSHIP OR WHATEVER  
3 YOU WANT TO CALL IT IS NOT CLAIMED IN SOME FASHION IN THE  
4 CLAIMS, BUT THAT THERE ARE NO ALGORITHMS CLAIMED FOR HOW YOU  
5 ESTABLISH THE VARIOUS RELATIONSHIPS THAT ARE NECESSARY, AND  
6 THAT'S MADE CLEAR ON PAGE EIGHT I GUESS IT IS OF THE ATTORNEY'S  
7 REMARKS.

8 AND AS FAR AS FOOLING THE EXAMINER AS OPPOSED TO  
9 ACTUALLY DISCLAIMING SOMETHING, I BELIEVE THAT THE TEST FOR  
10 REVIEWING THE PROSECUTION HISTORY IS FROM AN OBJECTIVE POINT OF  
11 VIEW, NOT FORMULATING OR SPECULATING ON WHAT THE EXAMINER MUST  
12 OR MUST NOT HAVE THOUGHT, PARTICULARLY WHERE YOU HAVE EVIDENCE,  
13 AS THE COURT POINTED OUT IN ITS QUESTION TO MR. SCHLAFLY, THAT  
14 THERE IS DIRECT, OBJECTIVE EVIDENCE THAT THE EXAMINER DID NOT  
15 ACCEPT THE ARGUMENT UNTIL THE CLARIFICATION WAS ADDED TO ADD  
16 SIGNALS.

17 SO IN A SENSE, THE EXAMINER SAID, "I HAVE READ  
18 EVERYTHING YOU'VE SAID. IT MAY GIVE ME SOME COMFORT OR  
19 WHATEVER, BUT I WANT THIS SIGNAL IN THERE."

20 AND BACK IN THIS TIME FRAME, THE EXAMINERS GAVE WHAT  
21 IS FREQUENTLY CALLED SOMETHING THAT SAYS "THESE ARE THE REASONS  
22 FOR ALLOWANCE," AND IN PAGE 2 OF THE AUGUST 6TH, 1989 OFFICE  
23 ACTION, HE SAYS, "CLAIMS 1 TO 33 ARE ALLOWED SUBJECT TO  
24 APPLICANT'S INSERTION OF THE WORD, QUOTE, 'SIGNAL' CLOSED QUOTE,  
25 AND IN LIGHT AS DISCUSSED IN TELEPHONE INTERVIEW IN JULY OF

1 1989."

2 I THINK WE COME BACK TO WHAT THE COURT HAS ALREADY  
3 FOUND. THESE ARE NOT DISEMBODIED MATHEMATICAL CONCEPTS. THESE  
4 ARE CLAIMS OPERATING ON REAL WORLD SIGNALS AND DO NOT PREEMPT  
5 WHATEVER ALGORITHMS MAY OR MAY NOT BE CITED IN THEM.

6 SO I COME BACK TO WHERE I STARTED, WHICH IS THE  
7 ARGUMENT THAT I THINK IT IS ABSURD AND I THINK IT RESTS ON  
8 BLATANT DISREGARD FOR THE ENTIRELY OF THE PROSECUTION HISTORY.

9 THE COURT: THANK YOU. MOTION GRANTED.

10 WHO'S GOING TO ARGUE THE NEXT MATTER ON THE MOTION  
11 FOR SUMMARY JUDGMENT ON ANTI-TRUST AND UNFAIR BUSINESS  
12 PRACTICE?

13 MR. FRAM: YOUR HONOR, AS SOON AS WE FIGURE OUT THE  
14 SHUFFLE ON THE MICROPHONE, I'LL BE ARGUING THE ANTI-TRUST  
15 PORTION OF THE MOTION, AND THEN MR. HOGAN WILL BE ARGUING THE  
16 STATE LAW AND UNFAIR COMPETITION CLAIMS.

17 THE COURT: OKAY.

18 MR. FRAM: YOUR HONOR, THE PLAINTIFF HAS A WIDE  
19 VARIETY OF ANTI-TRUST CLAIMS, AND I'LL TOUCH ON THE PRINCIPLE  
20 ONES BRIEFLY HERE.

21 BUT THERE'S AN OVERARCHING FLAW, AND I THINK THAT IS  
22 REALLY WHERE WE START AND WHERE WE END. THE OVERARCHING FLAW IS  
23 THIS: THAT ALL OF THE ANTI-TRUST CLAIMS ALLEGED, WHETHER THEY  
24 ARE SECTION TWO CLAIMS, SUCH AS THE ALLEGED TYING CLAIM, OR A  
25 PATENT MISUSE CLAIM, HANDGARDS CLAIM, OR THE SECTION ONE CLAIM,

1 THE PATENT POOLING CLAIM, THEY ALL REQUIRE, ON THESE  
2 ALLEGATIONS, SOME SHOWING OF MARKET POWER, SOME DEFINITION OF A  
3 MARKET, SOME SHOWING OF ACTUAL AFFECT ON A DEFINED MARKET.

4 THAT COMES THROUGH IN THE REQUIREMENT UNDER SECTION  
5 TWO OF A DANGEROUS PROBABILITY OF SUCCESSFULLY MONOPOLIZING A  
6 MARKET FOR THE SECTION TWO CLAIMS, OR TO THE RULE AND REASON  
7 ANALYSIS THAT APPLIES TO THE SECTION ONE CLAIM. WHAT WE DO NOT  
8 HAVE HERE ARE PER SE VIOLATIONS ALLEGED.

9 NOW, IN THE FACE OF THIS REQUIREMENT, WHAT THE  
10 PLAINTIFF HAS DONE HERE IS COMMITTED WHAT WE RESPECTFULLY  
11 SUGGEST IS A CLASSIC ERROR. WHAT THE PLAINTIFF HAS DONE IS  
12 SUGGESTED THAT BECAUSE THERE IS A PATENTED PRODUCT OR PROCESS,  
13 IN THIS CASE PUBLIC KEY ENCRYPTION, THAT THAT PATENTED PRODUCT  
14 MUST BE A MARKET ONTO ITSELF.

15 THE LAW IS QUITE CLEAR, IT HAS BEEN QUITE CLEAR FOR  
16 SOME TIME, THAT THAT ASSUMPTION IS NOT LEGALLY SUPPORTABLE. THE  
17 DEPARTMENT OF JUSTICE ANTI-TRUST INTELLECTUAL PROPERTY  
18 GUIDELINE, ON WHICH THE PLAINTIFF RELIES, CLEARLY STATES IN  
19 PARAGRAPH 2.2, AS FAR AS THE DEPARTMENT OF JUSTICE IS CONCERNED,  
20 THEY WILL NOT PRESUME, IF YOU HAVE A PATENT ON A PRODUCT, THAT  
21 THAT IS A SEPARATE MARKET.

22 THERE COULD BE A MARKET FOR PENS OR FOR ENCRYPTION  
23 OR GASOLINE. IF YOU COME UP WITH A NEW PEN, A BLACK PEN WITH A  
24 SPECIAL ROLLER POINT, IT STILL MUST COMPETE WITH THE OLD PENS  
25 UNLESS THE PLAINTIFF CAN PROVE A SEPARATE MARKET. THE MERE FACT

1 THAT THERE IS A PATENTED PRODUCT DOES NOT BY ITSELF GIVE YOU A  
2 SEPARATE MARKET.

3 SO WHAT DO WE HAVE HERE? WHAT WE HAVE HERE IS AN  
4 ASSERTION THAT THERE MUST BE A PUBLIC KEY ENCRYPTION MARKET.

5 WHAT'S WRONG WITH THAT? WHAT'S WRONG WITH THAT IS  
6 THAT THERE IS A BROADER MARKET FOR COMPUTER SECURITY PRODUCTS,  
7 AND CERTAINLY A MARKET FOR ENCRYPTION PRODUCTS. INDEED, BEFORE  
8 PUBLIC KEY ENCRYPTION CAME ON THE SCENE AS A COMMERCIALY VIABLE  
9 PRODUCT, THERE WAS ALREADY IN PLACE NON-PUBLIC KEY ENCRYPTION,  
10 WHAT WAS CALLED SYMMETRIC KEY ENCRYPTION, AND IT WASN'T A  
11 FLY-BY-NIGHT OPERATION. THERE WAS A DOMINANT PLAYER, IT WAS  
12 CALLED I.B.M., AND THEY HAD A WELL ESTABLISHED PRODUCT CALLED  
13 THE D.E.S. PRODUCT.

14 SO INDEED, WHEN P.K.P. CAME ON THE SCENE, WHAT WAS  
15 THE DOMINANT PRODUCT? WE DON'T HAVE TO PROVE THAT HERE. UNDER  
16 CELOTEX, IT IS THE PLAINTIFF'S BURDEN TO SHOW THE MARKET, TO  
17 DEFINE THE MARKET TERMS, TO SHOW OUR MARKET SHARE, TO SHOW  
18 MARKET POWER.

19 WE HAVE PUT THAT EVIDENCE IN THE RECORD AS TO WHAT  
20 THE ACTUAL MARKET FACTS WERE, SO THERE'S NO QUESTION WHAT'S  
21 GOING ON HERE. WE'RE NOT HIDING BEHIND A TECHNICALITY. WE WANT  
22 TO BE VERY CLEAR, UNDER CELOTEX UNDER SUMMARY JUDGMENT, WE  
23 PREVAIL BECAUSE OF THE PLAINTIFF'S FAILURE ON ALL OF THE  
24 ANTI-TRUST CLAIMS.

25 WHAT IS REMARKABLE IS THAT THE PLAINTIFF, WHEN YOU

1 GET RIGHT DOWN TO IT, WHEN YOU GET BEYOND THE ASSERTIONS, WHEN  
2 YOU GET TO THE PLAINTIFF'S ACTUAL FACTS, DOES NOT REALLY DISPUTE  
3 OUR VIEW OF THE MARKET.

4 WE TOOK HIS DEPOSITION JUST THIS JULY, JULY 25TH,  
5 AND A COPY OF THE TRANSCRIPT IS ATTACHED AS AN EXHIBIT TO  
6 MR. HOGAN'S DECLARATION.

7 WHAT'S INTERESTING IN THAT DEPOSITION, I MIGHT JUST  
8 DRAW THE COURT'S ATTENTION TO PAGES 50 AND 51, THE PLAINTIFF  
9 ADMITS THAT PUBLIC KEY TECHNOLOGY IS PART OF A LARGER ENCRYPTION  
10 MARKET. HE ADMITS THAT, QUOTE, "WITHIN ENCRYPTION IN 1990, THE  
11 DOMINANT TECHNOLOGIES WERE THE TRADITIONAL SYMMETRIC KEY  
12 SYSTEMS." THAT'S AT PAGE 63, LINES 1 THROUGH 4.

13 HE ADMITS WHEN HE COMES TO LOOK AT WHAT IS THE  
14 DEFENSE MARKET SHARE, WHAT IS THEIR POWER IN WHATEVER MARKET,  
15 THAT HE REALLY HAS NO IDEA OF THE SALES VOLUME, THE PUBLIC KEY  
16 CRYPTOGRAPHY AS A WHOLE, THAT'S AT 65 AND 66, AND HE ADMITS THAT  
17 HE HAD NO IDEA OF R.S.A.'S UNIT SALES. THAT'S PAGES 110 THROUGH  
18 112.

19 WHEN ASKED HIS UNDERSTANDING OF THE SIZE OF THE  
20 PUBLIC KEY CRYPTOGRAPHY MARKET, HE SAID AT PAGE 67 THAT HIS  
21 ESTIMATES ARE ONLY, QUOTE, "A GUESS."

22 WELL, YOUR HONOR, WE SUBMIT THAT ONE CANNOT BRING AN  
23 ANTI-TRUST CLAIM BASED UPON A GUESS ABOUT MARKET FACTS, MARKET  
24 DEFINITION AND MARKET POWER, NOT FOR THESE CLAIMS. SO ON THAT  
25 BASIS ALONE, WE BELIEVE WE'RE ENTITLED TO SUMMARY JUDGMENT RIGHT

1 THERE.

2 WE GO FURTHER. EVEN IF THE PLAINTIFF HAD SHOWN,  
3 WHICH HE HAS NOT, MARKET SHARE, MARKET DEFINITION, MARKET  
4 EFFECT, THE ACTUAL CONDUCT ALLEGED IS NOT --

5 THE COURT: THE ACTUAL WHAT?

6 MR. FRAM: THE ACTUAL CONDUCT ALLEGED IS NOT THE  
7 KIND OF INAPPROPRIATE CONDUCT THE ANTI-TRUST LAWS CONDEMN.

8 I'LL BRIEFLY TOUCH ON HIS MAIN CLAIMS. WE'VE GONE  
9 THROUGH THEM IN OUR PAPERS IN MORE DETAIL, BUT I'D LIKE TO START  
10 WITH THE PATENT POOLING CLAIM, THAT P.K.P. WAS AN ILLEGAL PATENT  
11 POOL.

12 AGAIN, PATENT POOLING IS NOT ILLEGAL PER SE. THE  
13 DEPARTMENT OF JUSTICE IN THEIR ANTI-TRUST GUIDELINES, PARAGRAPH  
14 5.5, THE AUTHORITY ON WHICH THE PLAINTIFF RELIES, IS VERY CLEAR  
15 IT IS NOT ILLEGAL PER SE.

16 MORE TO THE POINT, THE STANDARD OIL CASE ON WHICH HE  
17 ALSO RELIES SAYS ONE HAS TO LOOK AT THE MARKET FOR A PATENT IN A  
18 PATENT POOL AND SEE WHETHER THERE'S AN ANTI-COMPETITIVE ACT.  
19 THE FACTS THERE ARE STRIKINGLY SIMILAR HERE.

20 STANDARD OIL OBVIOUSLY DID NOT INVOLVE THE INTERNET,  
21 IT WAS A 1931 CASE, IT WAS THE AUTOMOBILE REVOLUTION, AND IT  
22 INVOLVED TECHNOLOGY FOR A BETTER WAY TO EXTRACT GASOLINE OUT OF  
23 CRUDE OIL. THERE HAD BEEN A TRADITIONAL WAY OF EXTRACTING  
24 GASOLINE, JUST AS THERE HAD BEEN A TRADITIONAL WAY TO DO  
25 ENCRYPTION. A NEW PROCESS CLAIM ALLOWING, YOU HEAT UP THE CRUDE

1 OIL, PUT IT UNDER PRESSURE, GET MORE GAS. THESE HAD A PATENT  
2 PROCESS IN THE 20'S AND THEY POOLED THEIR PATENTS.

3 THE UNITED STATES DEPARTMENT OF JUSTICE CHALLENGED  
4 IT IN THE STANDARD OIL CASE AND IN THE DISTRICT COURT THEY  
5 PREVAILED. BUT THEY PREVAILED ON THE THEORY THAT THEIR NEW  
6 TECHNOLOGY, THEIR CRACKING, HERE PUBLIC KEY'S ENCRYPTION, BUT  
7 THE NEW TECHNOLOGY WAS A NEW MARKET ONTO ITSELF.

8 THE SUPREME COURT, AT THE VERY END OF ITS OPINION,  
9 SAID ONE OF THE BASES FOR REVERSING THE DISTRICT COURT AND  
10 FINDING THIS PATENT POOL TO BE LEGAL WAS THE FACT THAT THE  
11 DISTRICT COURT HAD ASSUMED THE NEW PATENTED PROCESS, THE  
12 CRACKING PROCESS, WAS A SEPARATE MARKET.

13 IT SAYS, "YOU CAN'T DO THAT. WE'VE BEEN MAKING  
14 GASOLINE FOR AWHILE. YOU HAVE TO SHOW THIS NEW CRACKING  
15 GASOLINE IS NOT COMPETITIVE WITH THE TRADITIONAL GASOLINE.  
16 PLAINTIFF LOSES."

17 SAME WAY HERE, YOUR HONOR. THE PLAINTIFF HERE IS  
18 INVITING THE COURT TO MAKE THE SAME ERROR THE DISTRICT COURT  
19 MADE IN THE STANDARD OIL CASE. YOU CAN'T JUST ASSUME PUBLIC KEY  
20 ENCRYPTION IS A NEW MARKET. THERE'S TRADITIONAL ENCRYPTION.  
21 PLAINTIFF HAS THE BURDEN OF PROVING IT.

22 WHAT THE PLAINTIFF ALSO MISSES ABOUT THE PATENT  
23 POOL, HOWEVER, IS THIS PATENT COMBINATION EXCHANGE P.K.P.  
24 ACTUALLY DID. EVEN ASSUMING THERE WAS SOME MARKET POWER, EVEN  
25 ASSUMING THAT, WHAT DID IT DO? IT ISSUED A DOZEN LICENSES TO



1 COMPETITORS TO COME INTO THE MARKET AND CREATE THEIR OWN PUBLIC  
2 KEY ENCRYPTION ALTERNATIVES. THEY DID NOT HAVE TO BUY R.S.A.'S  
3 OR ANY OF THE P.K.P. PARTNERS' PRODUCT. WE'RE NOT TALKING ABOUT  
4 SMALL EMPLOYERS. WE'RE TALKING ABOUT A.T.&T. AND I.B.M.

5 MR. SCHLAFLY KNOWS THAT BECAUSE HE HAS BEEN ABLE TO  
6 SELL HIS PUBLIC KEY PRODUCTS THROUGH A.T.&T. BECAUSE THEY'VE GOT  
7 A LICENSE.

8 THE DEPARTMENT OF JUSTICE GUIDELINES SHED SOME LIGHT  
9 HERE. THE LAW IS VERY CLEAR. THESE PATENT HOLDERS HAD NO  
10 OBLIGATION AT ALL TO ISSUE A PATENT LICENSE TO ANYONE, PARAGRAPH  
11 2.2 OF THE GUIDELINES.

12 YET THEY FORMED THIS COMBINATION FOR THE EXPRESS  
13 PURPOSE OF ISSUING PATENT LICENSES. MR. SCHLAFLY SUGGESTS,  
14 ALMOST ARGUES, THAT THE POINT OF P.K.P. WAS TO COMBINE THE  
15 PATENT AND THEN GIVE PATENT LICENSES TO NO ONE.

16 BUT THE OPPOSITE HAPPENED. HE'S TURNED P.K.P.  
17 UPSIDE DOWN. THE PATENT MISUSE, ONCE AGAIN, HANDGARDS IS THE  
18 LEADING CASE, THERE'S NO DISPUTE ON THAT, IT REQUIRES A  
19 DANGEROUS PROBABILITY OF SUCCESSFULLY MONOPOLIZING THE MARKET.  
20 NO MARKET PROOF, NO MARKET SHARE, NO PROOF OF SUCCESSFUL,  
21 DANGEROUS PROBABILITY OF SUCCESS, SUMMARY JUDGMENT IS CALLED  
22 FOR.

23 INDEED, IN THE HANDGARDS CASE, IT SAID A QUOTE OF  
24 "MARKET DEFINITION WAS ESSENTIAL" AND THAT WAS IN HANDGARDS I,  
25 601 F.2D 993, FOOTNOTE 13, AND ALSO CITED IN THE AMERICAN

1 HOIST CASE IN OUR PAPERS. THAT'S AT 725 F.2D AT 1366.

2 AND, OF COURSE, IN HANDGARDS ITSELF, THE DEFENDANT  
3 CONTROLLED 90 PERCENT OF THE RELEVANT MARKET, AND THAT WAS  
4 ESTABLISHED BY THE PLAINTIFF, A FAR CRY FROM WHAT WE HAVE HERE.

5 BUT BEYOND THAT, EVEN IF THERE WERE A SHOWING OF  
6 MARKET POWER, EVEN IF THE MARKET HAD BEEN DEFINED, WHAT WE HAVE  
7 HERE IS A MERE SUGGESTION THAT THERE MIGHT BE PROBLEMS WITH SOME  
8 OF THESE PATENTS BROUGHT TO THE PARTNERS' ATTENTION BY THIRD  
9 PARTIES.

10 HE SAYS IN 1986, HE RECEIVED A LETTER FROM A PATENT  
11 ATTORNEY, NOT R.S.A.'S OWN ATTORNEY, SOME THIRD PARTY'S  
12 ATTORNEY DETAILING CERTAIN PROBLEMS IN SOME OF THE STANFORD  
13 PATENTS.

14 IN THE GILLETTE CASE WHICH WE CITE, IT'S VERY CLEAR  
15 IF A THIRD PARTY COMES TO YOU AND SAYS "THERE'S PROBLEMS WITH  
16 THE PATENT," THAT DOES NOT CONSTITUTE THE KIND OF BAD FAITH  
17 THAT'S REQUIRED FOR A PATENT MISUSE CLAIM, AND IT COULDN'T,  
18 BECAUSE IN EVERY PATENT ENFORCEMENT CASE, SOMEBODY HAS AN  
19 ARGUMENT OR A THEORY THAT THERE'S THIS PROBLEM OR THAT PROBLEM  
20 IN THE PATENT. THE MERE FACT THAT THERE'S INFORMATION OUT THERE  
21 AND IT'S BEEN BROUGHT TO YOUR ATTENTION BY SOMEONE ELSE'S LAWYER  
22 DOES NOT, AS A MATTER OF LAW, SATISFY THE PLAINTIFF'S BURDEN OF  
23 PROOF. AND AGAIN, THAT'S THE GILLETTE CASE.

24 UNTYING, OF COURSE, UNDER JEFFERSON PARISH, AS FAR  
25 AS THE TYING CLAIM IS CONCERNED, THE SUPREME COURT HAS SAID

1 THERE MUST BE MARKET POWER, AND I WILL NOT BELABOR THE POINT  
2 I'VE BEEN MAKING ABOUT THE PLAINTIFF'S FAILURE.

3 THERE'S, OF COURSE, ANOTHER FAILURE. THE ARGUMENT  
4 HERE IS THAT R.S.A., THIS IS THE PLAINTIFF'S THEORY AS OF THIS  
5 POINT IN ITS EVOLUTION, HE STARTED OUT IN THE COMPLAINT SAYING  
6 P.K.P. WAS TYING, NOW IT'S R.S.A. WAS TYING, THAT R.S.A. TIED  
7 THE SOFTWARE SALES TO TAKING A PATENT LICENSE.

8 YOUR HONOR, DURING THE EXISTENCE OF P.K.P., R.S.A.  
9 WAS NOT SELLING PATENT LICENSES. THAT WAS THE WHOLE POINT OF  
10 THE PARTNERSHIP. IT'S AS IF I AM, I HAVE A DAIRY AND I'M IN THE  
11 EGGS AND BUTTER BUSINESS AND I GIVE UP THE BUTTER BUSINESS. YOU  
12 CAN'T SUE ME FOR TYING, AND I DON'T THINK THERE'S A CAUSE OF  
13 ACTION FOR UNTYING. IT'S JUST GONE.

14 WHEN WE ASKED HIM AT HIS DEPOSITION, "WHAT IS YOUR  
15 PROOF THAT THERE'S TYING," HE SAID "MAYBE IN THE MICROSOFT  
16 CASE." BUT WHEN YOU GOT DOWN TO THE DEPOSITION AT PAGE 77, HE  
17 HAD NO PROOF. "NETSCAPE," HE SAID "THERE MIGHT HAVE BEEN SOME  
18 TYING," PAGE 86. NO PROOF OVERALL ON PAGE 82.

19 THOSE ARE THE THREE CITES I MIGHT SUGGEST THE COURT  
20 MIGHT WANT TO CONSIDER.

21 FINALLY, ON PRICE DISCRIMINATION, THERE HAS TO BE  
22 HARM TO CONSUMERS. HE CONCEDES THAT IN HIS OPPOSITION. THE  
23 U.S.M. CASE, 694 F.2D AT 512 CLEARLY HOLDS YOU MUST DEFINE A  
24 MARKET THE 7TH CIRCUIT SO HELD, TO SHOW DISCRIMINATION CLAIM.

25 BUT, OF COURSE, YOU ALSO HAVE TO SHOW THERE'S PRICE

1 DIFFERENTIAL, THE ELEMENTARY LEVEL. AT HIS DEPOSITION, WE ASKED  
2 THE PLAINTIFF, "DO YOU KNOW WHAT WAS CHARGED NETSCAPE," BECAUSE  
3 THAT'S ONE OF HIS EXAMPLES OF PRICE DISCRIMINATION.

4 AT PAGE 106 AND 107, HE DIDN'T KNOW. HE DIDN'T KNOW  
5 NETSCAPE'S PRICE OR MICROSOFT'S PRICE. THIS IS 1995 AND THESE  
6 ARE EXHIBITS C, D AND E OF THE HOGAN DECLARATION.

7 HE WAS ASKED, "DO YOU KNOW THE PRICE OR TERMS OF  
8 THESE LICENSES THAT YOU SAY ARE SO DISCRIMINATORY," AND HE SAID  
9 HE DIDN'T KNOW.

10 AND WHAT IS THE EVIL HE COMPLAINS OF? HE COMPLAINS  
11 THAT NETSCAPE AND MICROSOFT HAVE BEEN GIVING AWAY THE SOFTWARE  
12 FOR FREE. HOW THAT IS ANTI-COMPETITIVE AND HARMING CONSUMERS IS  
13 ANYONE'S GUESS, AND THAT'S WHAT ANTI-TRUST LAW IS SUPPOSED TO  
14 DO, PROTECT CONSUMERS. HERE HE'S PROTECTED FROM GETTING FREE  
15 PRODUCTS.

16 I'M NOT GOING TO ADDRESS THE BOYCOTT OR INTIMIDATION  
17 CLAIM. I THINK A FAIR READING IS HE'S NOT PURSUING THAT AT THIS  
18 TIME.

19 IN CONCLUSION, WE'D SUGGEST THAT WHILE LITIGATING IS  
20 ALWAYS COSTLY, LITIGATING AGAINST A PLAINTIFF THAT HAS NO PROOF  
21 IS WASTEFUL. THIS HAS GONE ON FOR FOUR YEARS. HE'S HAD AMPLE  
22 OPPORTUNITY TO DEVELOP THIS, DEVELOP MARKET FACTS, DEVELOP PROOF  
23 OF INAPPROPRIATE CONDUCT.

24 WE RESPECTFULLY REQUEST THAT OUR ANTI-TRUST MOTION  
25 AND MOTION ON UNFAIR BUSINESS PRACTICE CLAIMS BE GRANTED AND

1 THESE CLAIMS BE DENIED SO THAT THIS LONG, DRAWN OUT EXERCISE CAN  
2 COME TO A CLOSE. THANK YOU.

3 THE COURT: THANK YOU.

4 MR. SCHLAFLY, WHAT IS THE MARKET WE'RE TALKING  
5 ABOUT?

6 MR. SCHLAFLY: THERE ARE TWO MARKETS SPECIFIED IN MY  
7 COMPLAINT, PUBLIC KEY CRYPTOGRAPHY AND CRYPTOGRAPHY SOFTWARE.

8 THE COURT: WHAT'S THE MARKET POWER? CAN YOU  
9 DESCRIBE THAT, EVIDENCE OF MARKET POWER, OR DO YOU HAVE JUST  
10 CONCLUSIONS?

11 MR. SCHLAFLY: THE EVIDENCE OF MARKET POWER IS THAT  
12 DEFENDANTS P.K.P. CONTROLLED THE PATENT FOR ALL OF PUBLIC KEY  
13 CRYPTOGRAPHY, AND THAT, AND THAT PUBLIC KEY CRYPTOGRAPHY IS  
14 ESSENTIAL FOR ALL OF, YOU KNOW, MODERN SECURE COMMUNICATIONS.

15 THE COURT: OKAY.

16 MR. SCHLAFLY: YOU KNOW, IN ADDITION TO THAT, LET ME  
17 JUST SAY THAT I THINK THAT FURTHER EVIDENCE OF THEIR MARKET  
18 POWER IS THE FACT THAT THEY'VE BEEN ABLE TO GET AWAY WITH SOME  
19 OF THESE, SOME OF THESE MONOPOLISTIC TACTICS THAT I'VE  
20 DESCRIBED.

21 THE COURT: DESCRIBE THEM AGAIN FOR ME, PLEASE.

22 MR. SCHLAFLY: OKAY, I'LL DO THAT.

23 NOW, LET ME -- LET ME JUST SAY, FIRST OF ALL, THAT  
24 THE DEFENDANTS MAKE A BIG POINT ABOUT HOW I DON'T KNOW THE EXACT  
25 TERMS WITH NETSCAPE AND MICROSOFT AND SOME OF THESE OTHER

1 LICENSEES AND I DON'T KNOW THE DEFENDANT'S ACTUAL SALES.

2 I'D LIKE TO EXPLAIN THAT, BECAUSE I REQUESTED  
3 THOSE IN THE PROCESS OF DISCOVERY WITH THE DOCUMENTS ON THOSE,  
4 AND THEY REFUSED TO GIVE THEM TO ME AND THAT'S WHY I DON'T  
5 KNOW.

6 I THOUGHT THEY WERE RELEVANT AND I ASKED FOR THEM.  
7 I DIDN'T GET THEM, AND I TRIED TO GET SOME RELIEF FROM THE  
8 MAGISTRATE. I DIDN'T GET IT. BUT THAT'S WHY I DON'T KNOW. I  
9 PURSUED THOSE AS BEST I CAN.

10 AND I DO THINK THAT THOSE DOCUMENTS WOULD BE VERY  
11 USEFUL IN HELPING ME, HELPING ME PROVE MY CASE AND ASSESSING  
12 DAMAGES, BUT I DON'T THINK IT'S NECESSARY TO PROVE MY CLAIM.

13 LET ME SHOW YOU WHAT I DO KNOW AND WHAT I CAN  
14 PROVE. I CAN PROVE THAT THE DEFENDANTS POOLED TWO COMPETING,  
15 HORIZONTALLY COMPETING TECHNOLOGIES WHEN THEY POOLED THE PATENTS  
16 ON THE STANFORD AND M.I.T. TECHNOLOGIES. THOSE ARE THE LEADING  
17 TECHNOLOGIES IN USE TODAY AND AT THAT TIME, AND THEY'RE IN  
18 DIRECT COMPETITION AND THEY, THEY'RE INDEPENDENT TECHNOLOGIES IN  
19 THAT ONE DOES NOT BLOCK THE OTHER.

20 NOW, THE PRECEDENCE FOR POOLING PATENTS, THAT'S JUST  
21 STANDARD OIL AND UNDER THE GUIDELINES, I THINK THE GUIDELINES IS  
22 PROBABLY BETTER TO LOOK AT THAN STANDARD OIL, YOU LOOK FOR SOME  
23 PRO-COMPETITIVE BENEFITS, SUCH AS IF THE PATENTS ARE BLOCKING;  
24 THAT IS, YOU CAN'T USE ONE WITHOUT THE OTHER.

25 BUT AS I'VE SHOWN IN THE EVIDENCE, THEY WERE NOT

1 BLOCKING; THAT IS, THAT EVEN -- ONE THAT IS THAT THE M.I.T. HAD  
2 A SETTLEMENT WITH STANFORD IN THAT SOMEONE COULD PRACTICE,  
3 SOMEONE COULD GET LICENSED ON THE M.I.T. PATENT OR THE STANFORD  
4 TECHNOLOGY INDEPENDENTLY AND WOULD NOT HAVE TO LICENSE THE OTHER  
5 ONE IN ORDER TO PRACTICE THE ART.

6 OKAY. THAT'S ONE THING THAT I CAN PROVE, THAT THEY  
7 PATENTED HORIZONTALLY COMPETING TECHNOLOGY, AND THAT THEIR  
8 PURPOSE WAS TO MONOPOLIZE THE MARKET, NAMELY, THE PUBLIC KEY  
9 CRYPTOGRAPHY MARKET.

10 AND I CAN PROVE THAT THEY INTENDED TO DIVIDE THE  
11 MARKET BETWEEN HARDWARE AND SOFTWARE. I HAVE A SWORN STATEMENT  
12 FROM THE PRESIDENT OF P.K.P. AND R.S.A. SAYING THAT R.S.A. WAS  
13 GOING TO TAKE THE SOFTWARE PART OF THE MARKET AND THAT CYLINK  
14 WAS GOING TO TAKE THE HARDWARE PART OF THE MARKET.

15 OKAY. WHAT ELSE CAN I PROVE? I CAN ALSO PROVE THAT  
16 WHEN THEY POOLED THESE PATENTS, THEY PROMISED A REASONABLE AND  
17 NON-DISCRIMINATORY LICENSING POLICY, AND THAT'S, THAT'S  
18 PRESUMABLY SUPPOSED TO BE THE PRO-COMPETITIVE BENEFITS TO  
19 POOLING THE PATENTS.

20 HOWEVER, I CAN PROVE THEY DIDN'T DO THAT BECAUSE I  
21 CAN PROVE THAT THEY REFUSED TO GRANT --

22 THE COURT: ARE THESE ARGUMENTS OR ARE THEY BACKED  
23 BY EVIDENCE TO SUPPORT YOUR ARGUMENTS?

24 MR. SCHLAFELY: I HAVE A LETTER FROM R.S.A. DATA  
25 SECURITY SAYING THEY'RE REFUSING TO LICENSE THE PATENTS FOR THE

1 PURPOSES OF DOING TOOL KITS.

2 THE COURT: IS THAT IT?

3 MR. SCHLAFLY: THAT'S MY BEST EVIDENCE FOR THAT  
4 PARTICULAR POINT.

5 OKAY. WHAT ELSE CAN I PROVE? I CAN PROVE THEY TIED  
6 SOFTWARE LICENSES TO PATENT LICENSES, AND I THINK THAT TAKES  
7 SOME EXPLANATION BECAUSE MR. FRAM, I THINK, CONFUSED THAT POINT  
8 A LITTLE BIT.

9 HE SAYS THAT DURING THE TIME PERIOD THAT P.K.P. WAS  
10 ISSUING PATENT LICENSES, R.S.A. WAS NOT ISSUING PATENT LICENSES,  
11 AND I DON'T THINK THAT'S TRUE.

12 WHAT THEY WERE DOING IS THEY WERE ISSUING PATENT  
13 LICENSES THAT WERE TIED TO SOFTWARE LICENSES, AND THEY ISSUED  
14 MAYBE 100 OF THOSE AT THE TIME. IN FACT, THAT WAS, THAT WAS  
15 THEIR WHOLE BUSINESS MODEL, THAT WAS THE MAJORITY OF THEIR  
16 REVENUES. THAT WAS HOW THEY MADE THEIR MONEY, AND I DON'T THINK  
17 THAT CAN BE DISPUTED.

18 I MEAN, THEY CAN ARGUE LEGALISTICALLY WHAT WAS, WHAT  
19 WAS UNDER, WHAT WAS ALLOWED UNDER THOSE CONTRACTS OR SOMETHING,  
20 BUT THEY WERE OFFERING PATENT LICENSES ALONG WITH THOSE SOFTWARE  
21 LICENSES. THE SOFTWARE WOULD BE USELESS WITHOUT A PATENT  
22 LICENSE TO GO WITH IT.

23 I CAN ALSO PROVE PRICE DISCRIMINATION BECAUSE SOME  
24 CUSTOMERS WERE REQUIRED TO PAY ROYALTIES, MOST CUSTOMERS WERE,  
25 BUT SOME CUSTOMERS WERE NOT REQUIRED TO PAY ROYALTIES.



1           AGAIN, I DON'T KNOW THE EXACT TERMS OF ALL THESE  
2       LICENSES, BUT I DO KNOW THAT NETSCAPE AND MICROSOFT WERE GIVING  
3       AWAY FREE PRODUCTS, SO THEY'RE OBVIOUSLY NOT PAYING ANY  
4       ROYALTIES, WHEREAS MOST OTHER PEOPLE ARE PAYING ROYALTIES.

5           YOU CAN ARGUE THAT THE PUBLIC BENEFITS FROM FREE  
6       PRODUCT, BUT THAT'S THE ARGUMENT YOU CAN ALWAYS MAKE IN THE CASE  
7       OF PRICE DISCRIMINATION.

8           IN THE CASE OF PRICE DISCRIMINATION, SOME PEOPLE ARE  
9       OFFERED A LOWER PRICE THAN OTHERS AND SOMEONE, IF YOU CAN,  
10      SOMEONE, THE MONOPOLIST, COULD ALWAYS JUSTIFY THAT AND SAY,  
11      "WELL, WE'RE GIVING SOME PEOPLE A SPECIAL PRICE BREAK. WE'RE  
12      DOING THEM A FAVOR. WHAT CAN BE WRONG WITH THAT?"

13          BUT THERE IS SOMETHING WRONG WITH THAT BECAUSE IT'S  
14      ANTI-COMPETITIVE. IT MEANS THAT I CANNOT COMPETE IN THE  
15      MARKETPLACE USING THE BUSINESS MODEL THAT NETSCAPE AND MICROSOFT  
16      DO BECAUSE THEY ARE ABLE TO GIVE AWAY FREE SAMPLES OF THEIR  
17      PRODUCT ON THE INTERNET AND I CAN'T.

18          OKAY. NEXT I CAN PROVE THAT R.S.A. DATA OFFERED  
19      PATENT LICENSES WHICH EXCLUDED THE CUSTOMER FROM USING MY  
20      SOFTWARE, AND FOR THAT I HAVE THE PATENT LICENSE, IT'S ONE OF MY  
21      EXHIBITS. I HAVE THE PATENT LICENSE THAT THEY USED, AND IT  
22      SPECIFICALLY SAYS THAT THEY CANNOT BUY SOFTWARE FROM AN R.S.A.  
23      COMPETITOR. THEY CAN -- THEY CAN USE THEIR OWN OR THEY CAN BUY  
24      IT FROM R.S.A., BUT THEY CANNOT BUY IT FROM A COMPETITOR.

25          THIS, I CLAIM, IS AN ANTI-COMPETITIVE PRACTICE, AND

1 I NOW KNOW OF AT LEAST ONE COMPANY THAT THAT ACTUALLY APPLIES  
2 TO. I WOULD HAVE INCLUDED IT IN MY PAPERS, BUT I JUST GOT THE  
3 INFORMATION ON IT YESTERDAY. CAN I DISTRIBUTE THIS  
4 (INDICATING)?

5 THE COURT: SURE. IT'S ENTITLED FORM 10K FOR  
6 MINNOWS TECHNOLOGY CORPORATION?

7 MR. SCHLAFLY: RIGHT. THAT'S A PUBLIC COMPANY AND  
8 THIS IS FROM THEIR 10K, WHICH IS A STATEMENT THEY'RE REQUIRED TO  
9 FILE WITH THE SECURITY AND EXCHANGE COMMISSION EVERY YEAR.

10 IT'S ABOUT 50 PAGES LONG. I PULLED IT OFF THE  
11 INTERNET AND IT'S VERY LONG. I DIDN'T INCLUDE THE WHOLE THING,  
12 BUT IT INCLUDES A SECTION THAT DESCRIBES THEIR LICENSE AGREEMENT  
13 WITH R.S.A., AND IF YOU SKIP DOWN TO THE VERY LAST SENTENCE ON  
14 THE PAGE, IT SPECIFICALLY SAYS THEIR LICENSE AGREEMENT REQUIRES  
15 THEM, REQUIRES THEM TO USE THE R.S.A. TECHNOLOGY AND FORBIDS  
16 THEM FROM USING ANYTHING ELSE, FROM USING A COMPETITOR'S  
17 PRODUCT.

18 SO THE RESULT IS I CAN'T SELL TO THIS COMPANY  
19 BECAUSE R.S.A. HAS SUCCESSFULLY LOCKED THEM INTO A LICENSE  
20 AGREEMENT THAT FORBIDS IT.

21 AND I ALSO SUGGEST THAT AGREEMENTS LIKE THIS ARE  
22 FURTHER EVIDENCE OF THEIR MARKET POWER. ONLY IF YOU HAVE MARKET  
23 POWER ARE YOU ABLE TO FORCE A LICENSEE TO SIGN AN AGREEMENT WITH  
24 CONDITIONS THAT THEY DON'T BUY FROM COMPETITORS.

25 THE COURT: OKAY, THANK YOU. ANYTHING ELSE?

1 MR. SCHLAFLY: WELL, A COUPLE OF POINTS. THERE ARE  
2 A COUPLE OTHER POINTS I'D LIKE TO MAKE WHILE I'M HERE.

3 THE DEFENDANTS' EVIDENCE THAT THEY PUT FORWARD ON  
4 THIS IS, I MEAN, SINCE IT'S THEIR MOTION, THEY'RE SUPPOSED TO  
5 PUT FORWARD SOME EVIDENCE, AND THE EVIDENCE THEY PUT FORTH  
6 CONSISTS PRIMARILY OF TWO DEPOSITIONS, AND ONE DEPOSITION WAS  
7 FROM THEIR PRESIDENT, JIM BIDZOS, WHO DECLARES THAT P.K.P. WAS  
8 FORMED AS A BONA FIDE EFFORT TO SETTLE A PATENT DISPUTE. I  
9 THINK THE RECORD IS CLEAR FROM THE DOCUMENTS I'VE FILED THAT  
10 THERE WAS NO PATENT DISPUTE, THAT R.S.A. DATA ALREADY HAD A  
11 LICENSE TO THE STANFORD PATENTS AT THAT TIME AND THAT THERE WAS  
12 NO DISPUTE AND THAT THAT DEPOSITION IS NOT TRUTHFUL.

13 THEREFORE, YOU HAVE TO ASK, JUST WHAT ARE THE  
14 PRO-COMPETITIVE BENEFITS OF THESE PATENT POOLS? I MEAN, THE  
15 GUIDELINES SAY THAT, YOU KNOW, THEY DON'T ALWAYS SAY THAT IT'S A  
16 RULE OF REASON ANALYSIS. THAT HAS TO BE -- THERE HAS TO BE SOME  
17 PRO-COMPETITIVE BENEFITS, THERE HAS TO BE SOME PRO-COMPETITIVE  
18 BENEFITS THAT ARE GOING TO BALANCE OUT THE ANTI-COMPETITIVE  
19 EFFECTS, AND IF SOMETHING IS JUST PLAINLY ANTI-COMPETITIVE, THEN  
20 IT CAN BE FOUND TO BE AN ANTI-TRUST VIOLATION ON A PER SE  
21 APPROACH, AND I BELIEVE THAT SEVERAL OF THESE VIOLATIONS THAT  
22 I'VE GIVEN YOU ARE JUST SIMPLY AND PLAINLY ANTI-COMPETITIVE.

23 THE OTHER DECLARATION WAS FROM A MR. MURRAY, AND IT  
24 TALKS ABOUT THE PURPOSE OF P.K.P., BUT I DON'T SEE HOW THAT CAN  
25 HAVE ANY WEIGHT BECAUSE HE WASN'T THERE. HE HASN'T READ THE

1 PATENTS, HE DOESN'T KNOW THE LICENSING SITUATION, AND HIS  
2 DECLARATION IS ENTIRELY HEARSAY.

3 THE COURT: OKAY, THANK YOU.

4 MR. FRAM?

5 MR. FRAM: I WAITED FOR THE ANSWER TO YOUR HONOR'S  
6 QUESTION AS TO WHAT THE PROOF WAS OF THE MARKET, AND I DID NOT  
7 HEAR IT.

8 AS TO WHY PUBLIC KEY IS SEPARATE FROM ENCRYPTION IN  
9 GENERAL OR, INDEED, COMPUTER SECURITY IN GENERAL, PLAINTIFF SAYS  
10 IT'S DEFENDANTS' MOTION, THEREFORE, WE MUST HAVE SOME PROOF.

11 AS THE COURT IS WELL AWARE, UNDER CELOTEX, THE  
12 NON-MOVEMENT IN THIS CONTEXT, AN ANTI-TRUST CLAIMANT, MUST COME  
13 FORWARD AND CARRY THE BURDEN OF PROOF, AND THOSE ELEMENTS AND  
14 THE LAW PLACE IT ON HIM.

15 THE SUGGESTIONS REGARDING DISCOVERY ISSUES I THINK  
16 ARE OBVIOUSLY NOT BEFORE THE COURT, BUT I WILL SIMPLY RESPOND TO  
17 WHAT WAS RAISED BY THE PLAINTIFF.

18 PLAINTIFF BROUGHT NOT ONE MOTION, BUT TWO MOTIONS TO  
19 MAGISTRATE JUDGE INFANTE ON THIS ISSUE, AND BOTH WERE DENIED TO  
20 OBTAIN MORE DISCOVERY.

21 ON THE SECOND MOTION, MAGISTRATE JUDGE INFANTE SAID  
22 THAT THE PLAINTIFF HAD FAILED TO SHOW GOOD CAUSE. SO WHEN THE  
23 PLAINTIFF SAYS THAT HE'S DONE HIS BEST, MAGISTRATE JUDGE INFANTE  
24 DISAGREED.

25 THERE WERE FOUR YEARS TO TAKE DISCOVERY, TO COME UP

1 WITH SOME PROOF OF THE MARKET AND NOT SIMPLY HAVE CIRCULAR  
2 STATEMENTS SUCH AS THESE WE'VE JUST HEARD THAT THERE MUST BE A  
3 MARKET BECAUSE THEY'VE DONE THESE THINGS. THAT DOES NOT PROVE A  
4 MARKET.

5 ON THE THINGS THAT DEFENDANTS ARE ALLEGED TO HAVE  
6 DONE, THE STATEMENT WAS MADE THAT TECHNOLOGY WAS POOLED.

7 WELL, R.S.A. MADE SOFTWARE BEFORE P.K.P., DURING  
8 P.K.P., AND AFTER P.K.P. C.K.C CYLINK MADE HARDWARE BEFORE,  
9 DURING AND AFTER. THEY DID NOT POOL THEIR TECHNOLOGY. THEIR  
10 PRODUCTS CONTINUED TO BE OUT IN THE MARKET.

11 IF THE PLAINTIFF IS REFERRING TO THE PATENTS, HE  
12 COULD NOT BE REFERRING TO THE HELLMAN-MERKLE EMBODIMENT. THAT  
13 DIDN'T WORK BEFORE P.K.P., DURING OR AFTER, SO WE DON'T SEE  
14 WHERE PLAINTIFF IS PROVING ANYTHING BY THAT ALLEGATION.

15 THE SUGGESTION IS MADE THAT DEFENDANTS MUST COME  
16 FORWARD WITH SOME PRO-COMPETITIVE JUSTIFICATION OF A POOL.

17 AGAIN, THE LAW REQUIRES PLAINTIFF SHOW THE MARKET  
18 BEFORE WE GET TO THAT ISSUE.

19 THE SUGGESTION IS ALSO MADE IF THE POOL DOES NOT  
20 INVOLVE BLOCKING PATENTS, IT MUST BE IMPROPER. BUT IN FACT, THE  
21 DEPARTMENT OF JUSTICE GUIDELINES CLEARLY STATE, PARAGRAPH 5.5,  
22 THAT A POOL THAT REDUCES TRANSACTION COSTS, BE IT LITIGATION  
23 COSTS OR OTHERWISE, HAS IN IT A PRO-COMPETITIVE JUSTIFICATION.  
24 WE DON'T THINK WE HAVE TO PUT THAT ON AS PART OF OUR BURDEN ON  
25 SUMMARY JUDGMENT, BUT ONE NEED LOOK NO FURTHER THAN THE

1 AUTHORITY CITED BY PLAINTIFF.

2 THE ISSUE THAT'S DISCUSSED REGARDING R.S.A. SELLING  
3 PATENT LICENSES DURING P.K.P. AND THAT 100 WERE DONE, PLAINTIFF  
4 WOULD HAVE TO PUT ONE OF THEM IN EVIDENCE. THERE IS NONE.

5 I THINK WHAT HE'S REFERRING TO IS THE FACT THAT AS A  
6 MATTER OF LAW, CERTAIN PATENT RIGHTS MIGHT BE IMPLIED, AND THERE  
7 WAS A LARGE DISCUSSION BEFORE THIS COURT ON IMPLIED RIGHTS  
8 DURING THE LITIGATION BETWEEN R.S.A. AND CYLINK.

9 BUT IT CANNOT BE THE CASE THAT EVERY TIME SOMEONE  
10 SELLS SOFTWARE WITH AN IMPLIED RIGHT TO PRACTICES ONE'S PATENT,  
11 THAT IS A TIE. MY CLIENT WOULD HAVE UNWITTINGLY HAD AN  
12 ANTI-TRUST VIOLATION BECAUSE THE LAW IMPOSES A RIGHT UPON ITS  
13 CUSTOMERS TO USE ITS PRODUCT.

14 THE THING THAT MR. SCHLAFLY SEEMS TO BE MOST  
15 FOCUSED ON AT THIS POINT IS THIS QUESTION OF THE RESTRICTION IN  
16 THE R.S.A. LICENSE, THAT IT NOT LET OTHERS GO INTO THE TOOL KIT  
17 BUSINESS.

18 THIS IS POST-P.K.P. HE'S NOT SUGGESTING THIS WAS IN  
19 THE P.K.P. LICENSE. HE'S SAYING IT'S IN THE R.S.A. LICENSE.  
20 THAT'S THE EVIDENCE HE PUT FORWARD AT THE TIME HE FILED HIS  
21 COMPLAINT. I'M NOT SURE, UNLESS HE'S CLAIRVOYANT, WHERE THIS  
22 FITS IN.

23 PUTTING THAT TO THE SIDE, MR. SCHLAFLY IS SUGGESTING  
24 AN ANTI-TRUST VIOLATION IF A PATENTEE HOLDS ONTO A NITCH  
25 MARKET. THE PATENTEE HAS NO OBLIGATION TO LICENSE ANYONE, AND

1 THE DEPARTMENT OF JUSTICE, I BELIEVE IT'S IN PARAGRAPH 2.3 OF  
2 THE GUIDELINES, SAYS THAT IF A PATENTEE HOLDS ONTO A NITCH  
3 MARKET, THAT'S NOT A BAD THING. THAT'S ACTUALLY A GOOD THING.  
4 IT'S PRO-COMPETITIVE BECAUSE IT ENCOURAGES THE LINCESOR TO  
5 LICENSE ITS TECHNOLOGY BECAUSE IT KNOWS IT CAN HOLD ONTO SOME.  
6 THE LAW DOESN'T REQUIRE THE LINCESOR TO MAKE AN EITHER/OR  
7 CHOICE, GIVE UP ALL OF YOUR TECHNOLOGY SO I.B.M. CAN PUT YOU OUT  
8 OF BUSINESS, OR GIVE UP NONE OF IT.

9 THEY SAY, "IF YOU'D LIKE TO COME FORWARD AND HAVE A  
10 NITCH MARKET," THOSE ARE THE WORDS OF THE DEPARTMENT OF JUSTICE  
11 IN THE GUIDELINES, "IF YOU WANT TO HOLD ONTO THAT AND PUT THAT  
12 RESTRICTION IN YOUR LICENSE, THAT'S PRO-COMPETITIVE."

13 AS FAR AS ANTI-TRUST IS CONCERNED, WE DON'T THINK WE  
14 HAVE TO TOUCH THAT TO CARRY THE BURDEN, BUT I THINK SINCE THAT'S  
15 THE CENTERPIECE OF HIS CLAIM, IT'S WORTH NOTING.

16 IT CAN'T BE THE FACT THAT THE EXPERTS ON  
17 COMPETITION, THE ANTI-DIVISIONS SAYS THAT'S A GOOD THING AND WE  
18 WOULD HAVE LIABILITY FOR THAT UNDER A STATE UNFAIR COMPETITION  
19 CLAIM.

20 THAT'S ALL WE HAVE, YOUR HONOR.

21 THE COURT: THANK YOU. MATTER SUBMITTED.

22 MR. SCHLAFELY: COULD I JUST SAY A COUPLE MORE WORDS  
23 TO RESPOND TO WHAT HE SAID?

24 THE COURT: WE HAVEN'T FINISHED UP HERE YET.

25 MR. SCHLAFELY: OH, OKAY.

1 MR. HOGAN: GOOD MORNING AGAIN, YOUR HONOR. I  
2 GUESS I'LL ASK THE QUESTION. AM I ON?

3 THE COURT: YES.

4 MR. HOGAN: GOOD. I'LL BE BRIEF.

5 YOUR HONOR, THIS IS THE UNFAIR BUSINESS PRACTICES  
6 ASPECT, AND AS THE COURT IS AWARE, MUCH OF THAT RELATES AT LEAST  
7 TO SOMEHOW TIE INTO THE ANTI-TRUST BECAUSE THERE HAS TO BE SOME  
8 PREDICATE ACT OF UNLAWFUL OR UNFAIR CONDUCT THAT THE PLAINTIFF  
9 CAN SHOW THAT WAS ENGAGED IN BY ANY OF THE DEFENDANTS.

10 I'LL TRY NOT TO REPEAT WHAT HAS BEEN SAID BEFORE,  
11 BUT AS HAS BEEN SAID, WHEN WE ASKED MR. SCHLAFLY, AFTER SOME  
12 FOUR YEARS, WHAT EVIDENCE HE HAD TO SUPPORT ANY OF HIS  
13 ALLEGATIONS IN HIS RECENT DEPOSITION JUST ABOUT A MONTH AGO,  
14 THERE WAS NOTHING.

15 WE ASKED HIM ABOUT HIS ALLEGATIONS THAT P.K.P. HAD  
16 BEEN DISCRIMINATORY IN LICENSING. HE REFERRED TO NEWSPAPER  
17 ARTICLES, WHAT HE READ ON THE INTERNET, WHAT AND HE HEARD ABOUT  
18 WHAT MICROSOFT'S LICENSE MIGHT HAVE BEEN. THERE WAS NO  
19 EVIDENCE, NONE WHATSOEVER.

20 AND THAT WAS TRUE WITH RESPECT TO EACH AND EVERY ONE  
21 OF THE REMAINING ASSERTIONS ABOUT THE UNFAIR BUSINESS PRACTICES.

22 I WANT, YOUR HONOR, TO POINT OUT ONE PARTICULAR  
23 THING, AND THAT IS THAT MR. SCHLAFLY ALLEGES IN HIS AMENDED  
24 COMPLAINT, I BELIEVE IT'S PARAGRAPH 29, THAT CYLINK, IN AN  
25 UNRELATED LAWSUIT, HAD ALLEGED THAT AN R.S.A. PATENT WAS



1 INVALID, AND THEREFORE, HAVING ALLEGED THAT, HOW IN THE WORLD  
2 COULD THEY BE SUGGESTING THAT ITS PATENTS COULD BE LICENSED?

3 FIRST OF ALL, OF COURSE, IT'S AN UNRELATED LAWSUIT.  
4 IT'S AN AVERSION. IT'S NOT UNDER PENALTY OF PERJURY, SO IT'S  
5 SIMPLY, AGAIN, NOT EVIDENCE AT ALL THAT'S ADMISSIBLE IN THIS  
6 CASE.

7 IN ADDITION, I WOULD POINT YOUR HONOR TO THE COPPER  
8 WELD CASE HAVING TO DO WITH SECTION ONE VIOLATIONS, AND IN THAT  
9 CASE, THE COURT FOUND THAT IT'S NOT THE CONSPIRACY.

10 AGAIN, IF PLAINTIFF WERE ABLE TO SHOW THAT THE  
11 PARTIES HAD IN ANY WAY ENGAGED IN CONDUCT THAT RESTRAINED  
12 COMPETITION, THEN HE WOULD BE ABLE TO ARGUE THAT THERE WAS SOME  
13 SORT OF A CONSPIRACY.

14 BUT EVEN UNDER THAT CASE, EVEN WERE PLAINTIFF ABLE  
15 TO DO THAT, THE CONSPIRACY ITSELF, I.E., PUBLIC KEY PARTNERS,  
16 WOULD NOT BE LIABLE. THAT ONLY ADDRESSES, SECTION ONE ONLY  
17 ADDRESSES THE CONSPIRATORS.

18 HAVING SAID THAT, YOUR HONOR, UNLESS YOU HAVE ANY  
19 QUESTIONS?

20 THE COURT: NO.

21 MR. HOGAN: I WOULD JOIN MY COLLEAGUES IN  
22 REQUESTING THAT THE SUMMARY JUDGMENT BE GRANTED.

23 THE COURT: THANK YOU.

24 MR. SCHLAFLY?

25 MR. SCHLAFLY: I'D JUST LIKE TO ADDRESS A COUPLE OF

1 NEW POINTS THAT GOT RAISED.

2 FIRST OF ALL, I DON'T THINK -- SURE I'VE DONE SOME  
3 OF MY RESEARCH IN NEWSPAPERS AND ON THE INTERNET.

4 THE COURT: THAT'S HEARSAY. YOU CAN'T RELY ON THAT  
5 FOR MAKING A CASE.

6 MR. SCHLAFLY: I CAN'T RELY ON IT AS ADMISSIBLE  
7 EVIDENCE.

8 THE COURT: YOU HAVE TO GET THE EVIDENCE ON WHICH  
9 THE ALLEGATION IS MADE AND FIND OUT IF IT'S ACCURATE. THE  
10 ASSERTION IN THE NEWSPAPER IS NOT EVIDENCE OF THE FACT THAT IT  
11 HAPPENED. THAT'S THE POINT THEY'RE MAKING.

12 MR. SCHLAFLY: OKAY. WELL, I BELIEVE I HAVE  
13 SUFFICIENT EVIDENCE JUST IN TERMS OF DOCUMENTS I'VE GOTTEN FROM  
14 R.S.A. AND DECLARATIONS, WHICH ARE ADMISSIBLE, AND SOME THINGS  
15 LIKE, I DON'T KNOW, THAT 10K I JUST GAVE YOU WAS -- SURE, I GOT  
16 IT OFF THE INTERNET, BUT IT'S A FILING WITH THE SECURITY AND  
17 EXCHANGE. I'M SURE I CAN --

18 THE COURT: STUFF OFF THE INTERNET IS NOT EVIDENCE  
19 OF WHAT IT SAYS. IT SAYS IT, BUT THAT'S NOT PROOF AND EVIDENCE  
20 OF WHAT THEY ASSERT.

21 MR. SCHLAFLY: I UNDERSTAND.

22 LET ME GO ONTO SOME OTHER POINTS. MR. FRAM ARGUED  
23 THAT I HAVEN'T SUFFICIENTLY ARGUED THAT THERE'S A DIFFERENT  
24 MARKET, AND IN FACT, HE SAYS THAT I CONCEDED THAT THE PUBLIC KEY  
25 CRYPTOGRAPHY MARKET IS A PART OF SOME BROADER SECURITY MARKET.

1           YEAH, SURE, SOME MARKETS ARE PART OF OTHER MARKETS.  
2       THE COMPUTER SECURITY MARKET IS PART OF THE BROADER COMPUTER  
3       MARKET. THE COMPUTER MARKET IS PART OF THE --

4           THE COURT: YOU HAVE TO GO TO THE MARKET YOU'RE  
5       COMPETING IN AND SEE HOW THE MARKET IS BEING CONTROLLED AND SEE  
6       IF THERE'S A MONOPOLY.

7           MR. SCHLAFLY: EXACTLY.

8           THE COURT: SO WE HAVE TO KNOW WHAT THE MARKET IS  
9       THAT YOU'RE TALKING ABOUT, NOT JUST ALLEGATIONS. WE NEED  
10      EVIDENCE.

11          MR. SCHLAFLY: EXACTLY. AND I BELIEVE THAT PUBLIC  
12      KEY CRYPTOGRAPHY AND CRYPTOGRAPHY SOFTWARE ARE DEFINED MARKETS  
13      AND THE GOODS IN THOSE MARKETS ARE NOT INTERCHANGEABLE WITH  
14      GOODS IN SOME BROADER MARKET. THEY HAVEN'T ALLEGED THAT THEY  
15      ARE. I MEAN, THEY HAVEN'T -- WELL, ANYWAY.

16          OKAY. NEXT MR. FRAM TALKS ABOUT HOW EVEN ACCORDING  
17      TO THE GUIDELINES, PATENT POOLS OR VARIOUS OTHER ACTIONS CAN BE  
18      CONSIDERED OKAY IF THERE ARE PRO-COMPETITIVE BENEFITS, SUCH AS  
19      AVOIDING A LAWSUIT OR SOMETHING ELSE, BUT THEY HAVEN'T POINTED  
20      TO ANY TANGIBLE PRO-COMPETITIVE BENEFITS TO MOST OF MY  
21      ALLEGATIONS, SUCH AS THE PATENT POOLING.

22          THE ONLY ONES THEY POINTED TO, THEY CLAIM THE PATENT  
23      POOL AVOIDED A LAWSUIT, BUT I DO GO TO DOCUMENTS THAT SHOW THAT  
24      THERE WAS NO PENDING LEGAL ACTION.

25          THE COURT: THEIR ALLEGATIONS -- THE MOTION IS THAT

1 YOU HAVE NOT DESCRIBED THE MARKET, THE MARKET SHARE OR THE  
2 MARKET POWER, SO THAT IT'S AN INADEQUATE PLEADING AT THIS  
3 POINT. THAT'S THEIR MOTION FOR SUMMARY JUDGMENT. YOU HAVE TO  
4 COME UP WITH THE PROOF TO SUPPORT YOUR ALLEGATIONS, AND THEY SAY  
5 YOU HAVEN'T DONE ENOUGH ON THAT. HOWEVER, IT'S SOMETHING THAT  
6 I'LL HAVE TO THINK ABOUT.

7 MR. SCHLAFLY: OKAY. I'D LIKE TO EXPLAIN JUST A  
8 COUPLE OTHER POINTS.

9 ONE HAS TO DO WITH THE SOFTWARE LICENSES THAT R.S.A.  
10 GRANTED. NOW, IT'S TRUE THAT ANY TIME YOU SELL A PRODUCT AND  
11 THERE'S, AND IT'S A PATENTED PRODUCT, THEN THERE'S AN IMPLIED  
12 LICENSE TO USE THAT PATENT IN ORDER TO USE THAT PRODUCT.

13 MR. FRAM MADE THE ARGUMENT THAT, WELL, IF THAT'S  
14 TYING, THEN EVERY PATENT PRODUCT IS TIED.

15 THE DIFFERENCE IN THIS CASE IS THAT THE R.S.A.  
16 PATENT, THE M.I.T. PATENT WAS SOLD AS A SEPARATE ITEM. IT WAS  
17 LICENSED AS A SEPARATE ITEM, AND ONCE THAT HAPPENS, ONCE THE  
18 MARKET, A PRODUCT GETS DIFFERENTIATED INTO TWO PRODUCTS, THEN  
19 IT'S TYING TO PUT THEM BACK TOGETHER.

20 FOR EXAMPLE, I MEAN, THERE ARE LOTS OF PRODUCTS THAT  
21 ARE, YOU KNOW -- IF YOU JUST TAKE THIS TELEPHONE OR SOMETHING,  
22 PEOPLE SELL THAT PRODUCT TOGETHER AND THERE'S LOTS OF DIFFERENT  
23 COMPONENTS IN IT, AND THERE'S NOTHING ILLEGAL ABOUT SELLING A  
24 PRODUCT WITH LOTS OF DIFFERENT COMPONENTS.

25 BUT IF YOU DIFFERENTIATE THAT INTO SEPARATE

1 PRODUCTS, SELL THEM SEPARATELY, BUT THEN COME ALONG AND SAY TO  
2 CERTAIN CUSTOMERS, "YOU CAN ONLY BUY ONE IF YOU BUY ANOTHER,"  
3 THEN IT'S TYING.

4 OKAY, ONE MORE POINT. I WANT TO ADDRESS THIS  
5 QUESTION OF WHETHER, WHETHER A PATENTEE HAS NO OBLIGATION TO  
6 LICENSE AND THAT THEY HAVE A RIGHT TO HANG ONTO A NITCH MARKET.

7 IN GENERAL, THAT'S TRUE. HOWEVER, I THINK THERE'S  
8 TWO DIFFERENCES IN THIS CASE. FIRST OF ALL, --

9 THE COURT: A PATENTEE HAS AN OBLIGATION TO LICENSE  
10 OTHER PEOPLE TO USE THE PATENT AND GO INTO THE MARKET WITH IT.

11 MR. SCHLAFLY: USUALLY THERE'S NO OBLIGATION TO  
12 LICENSE THE PATENT. YOU CAN NOT SELL ANY PRODUCTS IF YOU WANT.

13 THE COURT: A PATENT IS A LEGAL MONOPOLY THAT PEOPLE  
14 CAN USE TO MAKE LOTS OF MONEY AND NOT HAVE LICENSES.

15 MR. SCHLAFLY: CORRECT. WHAT'S DIFFERENT IN THIS  
16 CASE IS THAT, FIRST OF ALL, THEY TOOK THE PATENTS AND POOLED  
17 THEM FOR SOME ALLEGEDLY PRO-COMPETITIVE BENEFITS, AND IF THOSE  
18 PRO-COMPETITIVE BENEFITS ARE THE LICENSES THAT ARE AVAILABLE,  
19 THEY HAVE TO ACTUALLY GRANT LICENSES AND MAKE THOSE AVAILABLE.

20 IF THEY'RE NOT DOING THAT, WELL, THAT'S NOT ONE OF  
21 THE PRO-COMPETITIVE BENEFITS OF THE POOL.

22 BUT THERE'S A SECOND POINT CONNECTED TO THAT THAT  
23 HAS TO DO WITH, IT'S KIND OF MORE CONNECTED WITH MY UNFAIR  
24 BUSINESS PRACTICE CLAIM, AND THAT IS THAT THE DEFENDANTS HAVE  
25 GONE TO VARIOUS STANDARD COMMITTEES AND SAID, "OH YES, WE HAVE A

1 REASONABLE AND NON-DISCRIMINATORY LICENSING POLICY," AND BASED  
2 ON THAT PROMISE, THEY'VE MANAGED TO GET SOME OF THEIR TECHNOLOGY  
3 ADOPTED AS A STANDARD.

4 NOW, I DON'T THINK -- IF THEY WANTED TO HOLD ONTO IT  
5 AS A NITCH MARKET, THEY SHOULDN'T BE GOING AROUND PROMISING THAT  
6 THEY HAVE THIS REASONABLE AND NON-DISCRIMINATORY LICENSING  
7 POLICY, BECAUSE IT THEN BECOMES AN UNFAIR BUSINESS PRACTICE TO  
8 ME BECAUSE I HAVE A HARD TIME COMPETING WITH THAT BECAUSE THEY  
9 GET THEIR STUFF ADOPTED AS THE STANDARD ON THESE PROMISES, BUT  
10 IF THEY DON'T HAVE THE LICENSING POLICY AND THEY'RE HANGING ONTO  
11 THE NITCH MARKET, THEN I'M UNFAIRLY LOCKED OUT BECAUSE I CAN'T  
12 COMPLY WITH THE STANDARD.

13 THE COURT: OKAY.

14 MR. SCHLAFLY: THAT'S ALL. THANK YOU.

15 THE COURT: MATTER SUBMITTED.

16 MR. HOGAN: YOUR HONOR, IF I MAY, AS THE COURT IS  
17 AWARE, WE DO HAVE A TRIAL DATE IN OCTOBER.

18 THE COURT: WE HAVE A SCHEDULING PROBLEM. WE'RE  
19 GOING TO HAVE TO SET NEW DATES. YOU WANT TO -- WE'LL SEND YOU  
20 INFORMATION ON PROPOSED DATES AND YOU LET US KNOW.

21 MR. HOGAN: VERY GOOD, YOUR HONOR. THANK YOU.

22 MR. SCHLAFLY: THANK YOU.

23 THE COURT: WE'LL TAKE ABOUT A FIVE-MINUTE RECESS.

24 (PROCEEDINGS CONCLUDED.)  
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE  
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO  
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE,  
CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND  
NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
TRANSCRIPTION TO THE BEST OF MY ABILITY.

  
LEE-ANNE SHORTRIDGE, C.S.R.  
CERTIFICATE NUMBER 9595